

No. 11,659

IN THE

**United States Circuit Court of Appeals
For the Ninth Circuit**

DORSEY McMAHAN,

Appellant,

vs.

JAMES A. JOHNSTON, Warden, United
States Penitentiary, Alcatraz Island,
California,

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

JURISDICTIONAL STATEMENT.

The method by which appellant (an inmate of the United States Penitentiary at Alcatraz Island, California) seeks to invoke the jurisdiction of the United States District Court for the Northern District of California, hereinafter called "the Court below", and the jurisdiction of this Honorable Court to review the decision of the Court below dismissing appellant's petition for mandatory relief directed against the appellee (the Warden of the said penitentiary), is set forth in the said appellant's jurisdictional statement on page one of his opening brief.

STATEMENT OF THE CASE.

The appellant, an inmate of the United States Penitentiary at Alcatraz Island, California, instituted an action in the nature of a petition for writ of mandamus to compel the appellee, the Warden of the said penitentiary, to transfer him to the Medical Center at Springfield, Missouri, from which institution he had escaped before being sent to Alcatraz, on the ground that he is insane, and on the further ground that he is not permitted to work in the prison because of his alleged mental incapacity. (Tr. 1-2.) An order to show cause thereupon issued (Tr. 3) and the appellee filed a motion to dismiss, asserting that the said petition failed to state a cause of action. (Tr. 6.) The appellant then filed a pleading which he entitled "Return on Motion to Dismiss Petition for Writ of Mandamus in case No. 27071-R". (Tr. 7-8.) The appellant also filed a request for appointment of counsel and a motion that the Warden produce him before the Court below for hearing, both of which motions were denied. (Tr. 4-5.) Thereafter the Court below entered the following order dismissing petition for writ of mandamus:

"The application of petitioner for a writ of mandamus to compel the respondent, the Warden of the United States Penitentiary at Alcatraz Island, California, to transfer him from the said institution to the Medical Center at Springfield, Missouri, on the ground that he is insane, is hereby denied.

It Is Further Ordered that the order to show cause, heretofore issued, be, and the same is,

hereby discharged. Such order is entered herein because federal prisons are but units of a single system under control of the Attorney General, who may transfer any prisoner from one institution to another for any reason sufficient to himself.

Zerbst v. Kidwell, 82 F. (2d) 756, reversed on other grounds, 304 U.S. 359;

Koehler v. Nicholson, 117 F. (2d) 344, 347.

Michael J. Roche,

United States District Judge.”

(Tr. pp. 9-10.)

From this latter order appellant appeals to this Honorable Court. (Tr. 11.)

QUESTION.

Does a United States Court have the power to order the Warden of a United States Penitentiary to transfer a prisoner to a Medical Center on the ground of the alleged insanity of the said prisoner?

CONTENTION OF APPELLEE.

The answer to the above stated question is: No.

ARGUMENT.

The appellee has narrowed the issues involved herein to the sole question as to whether a United States Court has the power to order the transfer of a

Although the United States has no statutory mandate directing the removal of a prisoner afflicted with a disease, to a place where his health will not suffer, the assistance of such a statute in Texas was held not to apply to one in legal custody after conviction.

Ex parte Smith, 64 S.W. 1052 (Tex.).

The appellant in his opening brief relies primarily on the case of

Coffin v. Reichard, CCA-6, 143 F. (2d) 443.

But this case on its facts does not have any application to our instant problem. This case merely held that prisoners under the control and in the custody of the United States are in the protection of the United States, upon which there is a co-extensive duty to protect against lawless violence, persons so detained, and a corresponding right on the part of these persons, secured by the constitution and laws of the United States, to be so protected. Excepting the fact that legal confinement does not deprive a prisoner of his other constitutional rights, there is no identity of facts between United States prisoners being subjected to violent cruelties and a United States prisoner, assumed to be insane, merely confined in a prison which is not primarily a medical institution. In this connection it should not be forgotten that under

Title 18 *U.S.C.A.*, Sec. 751,

the inmates of the United States Penitentiary at Alcatraz Island, California, are furnished with adequate medical care.

Congress has the power to make provisions for the proper care and treatment of federal prisoners during their imprisonment and to set up any form of administrative machinery that it deems necessary for such purpose.

Estabrook v. King, CCA-8, 119 F. (2d) 607.

And as above indicated, Congress has created an administrative body for such purpose under the Attorney General.

What constitutes an adequate penalty for an offense is a matter of legislative judgment and a Court will not interfere unless the penalty imposed is clearly and manifestly cruel and unusual.

Moore v. Aderhold, CCA-10, 108 F. (2d) 729.

Since no specific provision has been made by Congress for the care of federal prisoners who may be insane, it must follow that it is within the discretion of the Attorney General to act within his powers as to their care and custody. "Cruel and unusual punishment" usually implies something inhuman or barbarous and some punishment unknown at common law.

In re Pinaire, N.D. Tex. 46 F. Supp. 113.

In the problem at hand then, this Honorable Court, in order to reverse the order of the Court below, entered herein, would have to find that the incarceration of a federal prisoner assumed to be insane, in Alcatraz, is within such definition. This action of the Attorney General within his discretion, and impliedly



Appendix

Title 18 U.S.C.A.

Section 753. *Bureau of Prisons; establishment, director, officers and employees.* There is established in the Department of Justice a Bureau of Prisons, to be in charge of a director, who shall be paid a salary at the rate of \$10,000 a year, and shall be appointed by and serve directly under the Attorney General. The officers and employees of the existing office of the Superintendent of Prisons; all official records, furniture, and supplies; and all of the authority, powers, and duties conferred by law or regulation upon the Superintendent of Prisons or any of his subordinates are hereby transferred to the Bureau of Prisons. The Attorney General shall have the power to appoint such additional officers and employees as may be necessary.

Title 18 U.S.C.A.

Section 753a. *Same; duties; military prisons.* The Bureau of Prisons shall have charge of the management and regulation of all Federal penal and correctional institutions and be responsible for the safekeeping, care, protection, instruction, and discipline of all persons charged with or convicted of offenses against the United States: Provided, That the provisions of sections 753 and 753a-753j of this title shall not apply to military penal or military reformatory institutions or persons confined therein.

Title 18 U.S.C.A.

Section 753e. *Same; control and management; officers and employees; industries, farms, and other*

activities; classification and care of inmates. The control and management of any institutions established under sections 753c and 753d of this title, and the house of detention for Federal prisoners in New York City on the property 427-431 West Street, corner of Eleventh Street, New York City, shall be vested in the Attorney General, who shall have power to promulgate rules for the government thereof, and to appoint in accordance with the civil service laws and regulations all necessary officers and employees. In connection with such maintenance and operation the Attorney General is authorized to establish and conduct industries, farms, and other activities; to classify the inmates; and to provide for their proper treatment, care, rehabilitation and reformation.

Title 18 U.S.C.A.

Section 753f. *Commitment of persons by any court of the United States and the juvenile court of the District of Columbia; place of confinement; transfers.* All persons convicted of an offense against the United States shall be committed, for such terms of imprisonment as the court may direct, to the custody of the Attorney General of the United States or his authorized representative, who shall designate the places of confinement where the sentences of all such persons shall be served: Provided, That any sentence of imprisonment for an offense punishable by imprisonment for a term of one year or less shall not be served in a penitentiary except with the defendant's consent. The Attorney General may designate any available, suitable and appropriate institutions,

whether maintained by the Federal Government or otherwise or whether within or without the judicial district in which the person was convicted. The Attorney General is also authorized to order the transfer of any person held under authority of any United States statute from one institution to another if in his judgment it shall be for the well-being of the prisoner or relieve overcrowded or unhealthful conditions in the institution where such prisoner is confined or for other reasons. The authority conferred upon the Attorney General by this section shall extend to persons committed to the National Training School for Boys, by the Juvenile Court of the District of Columbia, as well as to those committed by any Court of the United States.

Title 18 U.S.C.A.

Section 751. *Medical service in Federal penal and correctional institutions; use of personnel of Public Health Service.* Authorized medical relief under the Department of Justice in Federal penal and correctional institutions shall be supervised and furnished by personnel of the Public Health Service, and upon request of the Attorney General, the Federal Security Agency shall detail regular and reserve commissioned officers of the Public Health Service, pharmacists, acting assistant surgeons, and other employees of the Public Health Service to the Department of Justice for the purpose of supervising and furnishing medical, psychiatric, and other technical and scientific services to the Federal penal and correctional institutions.